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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appeal From Administrative Law Court

The Honorable Robert L. Riebold, Administrative Law Judge

Appellant Case No.: 2026-001360

Joshua A. Vargo,

Appellant,

v.

South Carolina Criminal Justice Academy

Respondent,

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Council's finding that Vargo *willfully* provided false, misleading, or incorrect information- the sole basis for permanently denying his certification- is unsupported by substantial evidence, where no witness testified to any false statement, the dispositive interview record was prepared by an absent third party, and the fact-finder itself found Vargo's innocent explanation "plausible" and identified "no direct evidence" of willfulness.
- II. Whether the Council exceeded its statutory authority under S.C. Code Ann. §23-23-80(6) by permanently denying certification based on private conduct that occurred before Vargo was ever a candidate for or holder of a law enforcement certification.
- III. Whether the permanent denial of certification to a decorated ten-year trooper — the most severe sanction available- was arbitrary, capricious, and an abuse of discretion, and whether the Council's failure to make any findings on the overwhelming mitigating circumstances forecloses meaningful appellate review.
- IV. Whether this proceeding, commenced more than a decade after the conduct at issue and after the destruction of the polygraph record and the departure of the only percipient interviewer, is barred by laches, waiver, and estoppel.

STATEMENT OF THE CASE

This appeal concerns whether Joshua Vargo — a ten-year veteran of the South Carolina Highway Patrol, named Trooper of the Year for his post five of those ten years (RA 5) — may be *permanently* barred from ever serving as a law enforcement officer in South Carolina because of answers he gave during a pre-employment application process in 2013, before he was hired, trained, or certified.

In 2024, while applying to the South Carolina Law Enforcement Division (SLED), Vargo voluntarily disclosed on a questionnaire that he had used Adderall a handful of times in college in 2012–2013. (RA 234) SLED forwarded that disclosure to the Department of Public Safety, which compared it against Vargo’s 2013 Highway Patrol application materials and initiated a misconduct proceeding. (RA 227-228) The Department alleged misconduct under S.C. Code Ann. § 23-23-150 arising from (1) a February 2024 leave entry and (2) the 2013 pre-employment answers.

After a contested-case hearing, the Hearing Officer found the Department had *not* proven misconduct on the leave issue and had *not* proven that Vargo willfully made false statements to a law enforcement officer under § 23-23-150(A)(3)(i). (RA 45) The Hearing Officer found only that Vargo willfully provided incorrect information on a form under subsection (k), while expressly acknowledging it was “plausible” that Vargo “did not know what a controlled substance was” and so simply did not come to his mind. (RA 31).

The Law Enforcement Training Council (LETC or Council) nonetheless found misconduct under *both* subsections (i) and (k) and imposed the harshest available sanction —

permanent denial of certification. (RA 13) The leave allegation was abandoned and is not before this Court.

On Vargo's first appeal, the Administrative Law Court (Anderson, C.J.) remanded for the Council to issue specific findings of fact and conclusions of law in compliance with *Porter v. South Carolina Public Service Commission*. (RA 14-22) Without reconvening a hearing, calling the missing witnesses, or developing any new evidence, the Council simply rewrote and re-issued its decision on November 5, 2025, again imposing permanent denial. (RA 13.) The ALC (Reibold, A.L.J.) affirmed on April 28, 2026 (Final Order and Decision pg. 18) and denied rehearing on June 1, 2026 (Order Denying Petition for Rehearing pg 14). This appeal follows.

STATEMENT OF THE FACTS

Vargo's exemplary service. Vargo served the Highway Patrol for approximately ten years. (RA 5) He was Trooper of the Year for his post five of those ten years, earned canine and post awards, and received recognition from MADD. (RA 5) Throughout his tenure he was subject to random drug and alcohol screening and never tested positive or had any drug-related issue. The conduct at issue is not any on-duty act; it is limited entirely to statements made before he was hired.

The 2012–2013 conduct. While finishing college, Vargo occasionally used Adderall to study for exams. (RA 234) He graduated college in May 2013 and applied to the Highway Patrol months later.

The 2013 pre-employment paperwork. The Department's case rests on documents completed during the hiring process. The August 19, 2013 online application — generated by the Division of Human Resources, not the Department — asked at Question 14 whether Vargo had "ever used and/or experimented with any controlled substance within the last 10 years (excluding marijuana)." (RA 239) He answered "No." (RA 239) The October 1, 2013 polygraph questionnaire asked whether he had "ever used someone else's prescription drug,". (RA 242) None of the Department's forms ever mentioned Adderall; the SLED form, by contrast, listed Adderall by name — and Vargo disclosed it. (RA 234).

The background interview. During an October 2013 home interview, investigator J.C. Rikard asked about prescription medication not prescribed to Vargo. Rikard — not Vargo — recorded a marginal note, "maybe childhood from mother," and checked neither "yes" nor "no." (RA 94-95) Vargo testified he told Rikard he had used "prescription medication that did not belong to me."

(Vargo v. SCCJA, Final Order and Decision at 10) Rikard did not testify; his whereabouts are unknown to the Department.

The missing records. The Department did not preserve the polygraph audio or any transcript, did not call the polygraph administrator, and did not interview or call Rikard. The investigator, Captain Boehm, admitted he never explored whether Vargo understood Adderall to be a “controlled substance.” (RA 37-39)

The findings below. The Hearing Officer found Vargo’s innocent explanation “plausible.” The ALC agreed the explanation was “plausible,” found “no direct evidence of willfulness,” and stated repeatedly that “had it been the trier of fact, it may have reached a different result.” (RA 44-46). It affirmed solely because, under the deferential substantial-evidence standard, it concluded the Council’s contrary inference was also “plausible.” (RA 44-46).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs review of the Council's decision. Under S.C. Code Ann. § 1-23-380(5), a reviewing court may reverse or modify an agency decision when the appellant's substantial rights have been prejudiced because the findings or conclusions are, among other things, "in excess of the statutory authority of the agency," "affected by other error of law," "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," or "arbitrary or capricious or characterized by abuse of discretion." S.C. Code Ann. § 1-23-380; *see also* S.C. Dep't of Motor Vehicles v. Dover, 423 S.C. 153, 813 S.E.2d 532 (Ct. App. 2018) (applying the identical standard on appeal from the ALC). Whether the Council acted in excess of its statutory authority or committed an error of law is reviewed de novo. S.C. Code Ann. § 1-23-380.

Substantial evidence "is not a mere scintilla of evidence, nor evidence viewed blindly from one side of the case," but evidence that, considering the record as a whole, "would allow reasonable minds to reach the conclusion" the agency reached. *Bentley v. Spartanburg Cnty.*, 398 S.C. 418, 730 S.E.2d 296 (2012); *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996). Where a factual ruling is "without evidentiary support," it constitutes an abuse of discretion. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996) The reviewing court does not reflexively rubber-stamp: an agency's revocation or denial of a professional license will be reversed where, on the whole record, it is "clearly erroneous in light of the reliable, probative, and substantial evidence." *Tennis v. S.C. Dep't of Soc. Servs.*, 355 S.C. 551, 585 S.E.2d 312 (Ct. App. 2003).

ARGUMENT

I. The finding that Vargo *willfully* provided false information is not supported by substantial evidence and cannot stand.

The Council's decision hinges on a single element: willfulness. The statute does not punish an inaccurate answer; it punishes only one who "*wilfully*" makes a false statement to a law enforcement officer, § 23-23-150(A)(3)(i), or "*wilfully* provid[es]" false information on a form, § 23-23-150(A)(3)(k). (Vargo v. South Carolina Criminal Justice Academy at 11) The Department bore the burden of proving that Vargo acted with a deliberate intent to deceive. It did not carry that burden, and the record — as the fact-finders themselves acknowledged — will not bear the weight the Council placed on it.

A. "Willful" requires proof of a deliberate, conscious intent to deceive — not the mere existence of an inaccurate answer.

To properly find that Appellant Vargo willfully engaged in misconduct, the LETC had the duty to satisfy its burden of substantial evidence and establish 1) that Appellant Vargo made a false statement and 2) that Appellant Vargo did so willfully. South Carolina courts have defined "willful" across many contexts, and "[i]n each instance, the court has required a showing of a consciousness of wrongdoing in order to prove willfulness." State v. Garrard, 390 S.C. 146, 700 S.E.2d 269 (Ct. App. 2010) A willful act is "voluntary" and "intentional," "not accidental or involuntary." State v. Garrard, 390 S.C. 146, 700 S.E.2d 269 (Ct. App. 2010) In the administrative setting in particular, "willful" means "intentional," and where the statute demands "willful intention" the Legislature intended a "deliberate intention" or "formed intention." Reeves v. Carolina Foundry & Mach. Works, 194 S.C. 403, 9 S.E.2d 919 (1940). In *Reeves*, the Supreme Court set aside an administrative determination precisely because "[t]here was no evidence of a

deliberate or formed intention.” *Reeves v. Carolina Foundry & Mach. Works*, 194 S.C. 403, 9 S.E.2d 919 (1940). A willful act is one “done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done.” *State v. Sowell*, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006). Black’s Law Dictionary is in accord, defining “willfulness” as “[t]he voluntary, intentional violation or disregard of a known legal duty.” Black’s Law Dictionary (9th ed. 2009).

Measured against that standard, the Council’s willfulness finding cannot stand. The Council treated an inaccurate answer as proof of an intent to deceive, but the record supplies no evidence that Vargo acted with a conscious purpose to mislead. As the following sections demonstrate, the fact-finder itself deemed Vargo’s innocent explanation “plausible,” the Department’s own forms never named Adderall, and Vargo disclosed his prior use both to the background interviewer in 2013 and to SLED in 2024 — conduct incompatible with a deliberate scheme of concealment.

That principle in *Reeves* controls here. The question is not whether Vargo’s 2013 answers were, in hindsight, inaccurate. It is whether the Department proved that Vargo gave them with a conscious purpose to deceive. A finding of willfulness supported by “no evidence” of that mental state is an abuse of discretion. *Waters v. S.C. Land Res. Conservation Comm’n*, 321 S.C. 219, 467 S.E.2d 913 (1996); *State v. Garrard*, 390 S.C. 146, 700 S.E.2d 269 (Ct. App. 2010) (where there is no evidence to support a willfulness finding, the ruling cannot stand).

B. There is no evidence — let alone substantial evidence — that any statement to a law enforcement officer was willfully false (§ 23-23-150(A)(3)(i)).

The subsection (i) finding fails at the threshold. Only two people could have received an oral statement from Vargo: the polygraph administrator and the background interviewer, J.C. Rikard. (Vargo v. SCCJA, Final Order and Decision at 9) Neither testified. (Vargo v. SCCJA, Final Order and Decision at 10) No law enforcement officer testified that Vargo was heard making any false or incorrect statement. (Vargo v. SCCJA, Final Order and Decision at 10) The Council built a willfulness finding on a conversation no witness described and no transcript preserved.

The only artifact of the Rikard interview is Exhibit 6 — a form Rikard completed, on which he recorded a marginal note (“maybe childhood from mother”) and checked neither “yes” nor “no.” (Vargo v. SCCJA, Final Order and Decision at 2) The ALC agreed that Vargo did not complete Exhibit 6 and that it therefore cannot support a subsection (k) violation. (Vargo v. SCCJA, Final Order and Decision at 14) Having conceded that Exhibit 6 is not Vargo’s document, the Council cannot resurrect it as proof of a willful oral falsehood under subsection (i). The un rebutted testimony is Vargo’s own: that he told Rikard he had used “prescription medication that did not belong to me.” (RA 241-242) Rikard’s decision to leave the box unchecked corroborates that some qualifying disclosure was made. A finding that Vargo willfully lied to Rikard, drawn from a note Rikard wrote and no one can explain, is not “reliable, probative” evidence — it is conjecture. *Tennis v. S.C. Dep’t of Soc. Servs.*, 355 S.C. 551, 585 S.E.2d 312 (Ct. App. 2003).

C. The written-form findings rest on ambiguous questions the fact-finder itself deemed reasonably misunderstood (§ 23-23-150(A)(3)(k)).

The subsection (k) finding rests on forms completed during the hiring process. These findings are fatally undermined by the very findings the fact-finder made.

Form 1: The online application Question 14 — “controlled substance”. The Hearing Officer expressly found it “plausible” that Vargo “did not know what a controlled substance was.” (RA 9) The investigator admitted he never tested that understanding. (Vargo Final Agency Decision at 3) The form itself conflated “illegal drugs,” “prescription drugs,” and “controlled substance,” and the only modifier was “(excluding marijuana)” — inviting the reasonable reading that the question targeted illicit street drugs. The application does not expressly refer to Adderall. The Administrative Law Court conceded that had it “[b]een the finder of fact in this instance, it may have accepted [Vargo]’s argument.” (Final Order and Decision at 13). An answer that the fact-finder concedes may reflect an honest misunderstanding is not substantial evidence of a *willful* falsehood. Reeves v. Carolina Foundry & Mach. Works, 194 S.C. 403, 9 S.E.2d 919 (1940). It proves, at most, that the Department’s form was imprecise — a deficiency the Department authored and cannot now weaponize against Vargo.

Form 2: The “illegal drugs and narcotics” list (Exhibit 7, Question 7). On Exhibit 7, dated October 1, 2013, Question 7 — under the heading “ILLEGAL DRUGS AND NARCOTICS” — asks whether the applicant has used any of a listed set of “drugs and/or narcotics.” The Department designed this form and had every opportunity to list any substance of particular concern, yet Adderall is not enumerated in that list.

7. Have you ever used any of the following drugs and/or narcotics listed below?

YES () NO ☒

If YES, indicate by circling all that apply to you:

Cocaine	Crank	Crack	Hashish	Hash Oil
Thai stick	Heroin	Opium	Codeine	Morphine
Percodan	Speed	Amphetamine	Valium	PCP
Dilaudid	Barbiturate	Preludin	Methadone	Methaqualone
Quaaludes	Angel Dust	Mescaline	Peyote	LSD
MDA	Ecstasy	Mushrooms	Marijuana	

Sniff: Glue, Paint, Acetone, Greek Joint, Ice, and others.

On the other hand, in the SLED application, exhibit 4 (RA 214), Adderall is listed.

10. Have you ever used/tried any illegal drug(s) other than marijuana or abused any prescription drugs prescribed for yourself or for someone else? YES ☒ NO ()

If YES, circle the appropriate drug(s):

Cocaine	LSD	Amphetamine	Hashish	K2/Spice/Synthetic Marij.
Crack	Heroin	Peyote	Pain Killers	Barbiturates
Rohypnol	Opium	Mushrooms	<u>Oxycontin</u>	Valium
Ketamine	Ecstasy	Sleeping Pills	Hydrocodone	Xanax
Mescaline	Salvia	Methadone	Codeine	Methamphetamine
GHB	PCP	<u>Adderall/Ritalin</u>	Morphine	Other (not listed)

Inhalants: Glue, Paint, Acetone, Nitrous Oxide, or any similar substance

2012 - 2013 A few
(First time) (Last time) (How many times)

On no form did SCDPS ask Appellant about Adderall. SLED did ask about Adderall use on its form, and Appellant readily admitted it. This entire issue could have been avoided if SCDPS had more pointedly asked about Adderall or been clear in making a distinction between drugs and medications. To add to the confusion, three weeks later during the interview, Rikard asked Appellant about "prescribed medication not prescribed to you". (RA 242 Question 16). Appellant admitted to Rikard that he had taken medications that had been prescribed to others. The inconsistent terminology by SCDPS has contributed to the scrutiny Appellant is now being subjected to. To rely on responses to questions on forms that use imprecise and confusing language

as a basis for making a finding of misconduct as defined in S.C. Code Ann. §23-23-150(A)(3)(k), is an abuse of discretion. Appellant should not be penalized because SCDPS's forms lacked probative questions, used ambiguous and confusing terminology, were imprecise, and in one instance were not even completed by Appellant, but by the interviewer who never testified in this case.

Form 3: The polygraph questionnaire ("someone else's prescription drug"). This answer, too, cannot support a willfulness finding, because the Department preserved no evidence of the surrounding polygraph process that would reveal Vargo's intent. More fundamentally, the record shows Vargo *did* proceed to disclose to Rikard that he had used another's prescription medication — conduct irreconcilable with a deliberate scheme of concealment. As Vargo has consistently argued, a person bent on hiding drug use would not give answers inviting the very follow-up that occurred and would not later volunteer the same information to SLED. Administrative Law Court found that this form cannot satisfy the requirements of section §23-23-150(A)(3)(k).

D. The tribunal's own findings — "plausible," "no direct evidence," "may have reached a different conclusion" — confirm the record lacks substantial evidence of willfulness.

The decision below is remarkable for what it concedes. The ALC found Vargo's innocent explanation "plausible," found "no direct evidence of willfulness," and acknowledged that "had it been the trier of fact, it may have reached a different result." (Vargo v. South Carolina Criminal Justice Academy) The Council's inference of willful intent rested entirely on "circumstantial evidence" of supposed motive — that disclosure "would have disqualified him." (Vargo v. SCCJA, Final Order and Decision at 12)

Motive is not intent. Circumstantial evidence suffices only where “the circumstances ...lead to the conclusion with reasonable certainty” and carry “sufficient probative value to constitute the basis for a legal inference, not for mere speculation.” (Vargo v. SCCJA, Final Order and Decision at 12) A bare inference of motive — untethered to any witness, transcript, or probative account of what Vargo actually intended — does not reach reasonable certainty. It is precisely the “mere scintilla” that the substantial-evidence standard forbids. *Bentley v. Spartanburg Cnty.*, 398 S.C. 418, 730 S.E.2d 296 (2012) Because willfulness “requir[es] a showing of a consciousness of wrongdoing,” *State v. Garrard*, 390 S.C. 146, 700 S.E.2d 269 (Ct. App. 2010), and the record contains “no evidence of a deliberate or formed intention,” *Reeves v. Carolina Foundry & Mach. Works*, 194 S.C. 403, 9 S.E.2d 919 (1940), the misconduct finding is “clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record,” S.C. Code Ann. § 1-23-380, and must be reversed. This case is *Tennis*, not a case for deference: an agency’s denial of a professional license cannot stand where the record as a whole does not supply “substantial” or “reliable” evidence for it. *Tennis v. S.C. Dep’t of Soc. Servs.*, 355 S.C. 551, 585 S.E.2d 312 (Ct. App. 2003)

II. The permanent denial rests on private conduct predating any certification and thus exceeds the Council’s statutory authority.

The conduct at issue occurred in 2012–2013, when Vargo was a private citizen who had recently completed college — before he was hired, before he attended the Criminal Justice Academy, and before he held any certification. No allegation concerns his oath of office, his training, or any act during his decade of service.

The Council's enabling statute authorizes it to "certify and train qualified candidates and applicants" and to "provide for suspension, revocation, or restriction of the certification." S.C. Code Ann. § 23-23-80. Read in light of its subject matter, that authority reaches the conduct of officers and candidates — not the private conduct of persons who were neither.

The Administrative Law Court itself recognized the force of this argument, acknowledging "[t]here is some support for [the] argument" that conduct "which occurred before an individual was a law enforcement officer or candidate does not fall within the definition of misconduct" in § 23-23-150 or the implementing regulations. (*Vargo v. South Carolina Criminal Justice Academy Order Denying Petition for Rehearing* at 14)

Because this is a challenge to the *agency's statutory authority to act*, it is cognizable under § 1-23-380(5)(b) (decisions "in excess of the statutory authority of the agency") and reviewable as a question of law. S.C. Code Ann. § 1-23-380 The Council should not be permitted to convert an applicant's pre-employment paperwork — paperwork that, on the Department's own theory, would merely have resulted in a decision not to hire into grounds for a lifetime, statewide bar from the profession.

III. The permanent denial of certification was arbitrary, capricious, and an abuse of discretion, and the Council's refusal to make any findings on mitigation forecloses meaningful review.

Even if some misconduct were supported, permanent denial — the single harshest sanction on the regulatory menu — was an abuse of discretion on this record. The Council's own regulation supplies a graduated range of sanctions: permanent denial, time-limited denial, certification with probation, certification with conditions, or public reprimand. S.C. Code Ann. Regs. 37-108 A decision is "arbitrary if it is without a rational basis, is based alone on one's will

and not upon any course of reasoning and exercise of judgment ...or is governed by no fixed rules or standards.” *Trimmier v. S.C. Dep’t of Lab., Licensing & Regul.*, 405 S.C. 239, 746 S.E.2d 491 (Ct. App. 2013)

Two features render this sanction indefensible. *First*, the Council imposed the maximum penalty for a single, decade-old, pre-employment paperwork issue committed by an officer whose ten years of decorated service — five-time Trooper of the Year, canine and MADD honors, never a positive drug screen — are undisputed. (Vargo Final Agency Decision at 4). The Council has the authority to consider mitigating factors, including their seriousness and remoteness in time. S.C. Code Ann. Regs. 37-025(B). Those factors abound here:

1. No violation of any oath as a law enforcement officer;
2. No violation of any drug-use policy;
3. No violation of any training requirement;
4. The acts occurred more than ten years ago;
5. At the time of the conduct, Vargo was not a law enforcement officer, but merely a job applicant;
6. Vargo admitted to the Department, in the interview before he was hired, that he had used another person’s prescription;
7. Vargo readily admitted his college use of Adderall when SLED asked about it directly;
8. The Department never specifically asked Vargo about the use of Adderall; and
9. Vargo was an exemplary, award-winning employee for over a decade. He was Trooper of the Year for his assigned post five out of the ten years, and received canine awards, post awards, and an award from MADD. (RA 5 ll. 6-8)

Failure to make findings on the issue of mitigation allows the LETC to avoid review for an abuse of discretion on the issue of sanctions in this case. (See Footnote 1, pg. 5 in *Ragsdale v. South Carolina Criminal Justice Academy*, No. 19-ALJ-30-0344-AP, 2020 WL 804241 (S.C. Admin. Law Ct. Jan. 27, 2020).

Second, and critically, this sanction issued *after* the Administrative Law Court had already remanded the matter to the Council with instructions to make specific, reasoned findings under *Porter*. (Order of Remand at 6 (Anderson, C.J.)) The Council responded by rewording its decision without reconvening, without new evidence, and without a single finding addressing the overwhelming mitigating circumstances Vargo placed before it. A sanction imposed in defiance of a remand directive to reason through the record is the very definition of a decision “made ...without adequate determining principles.” Trimmier v. S.C. Dep’t of Lab., Licensing & Regul., 405 S.C. 239, 746 S.E.2d 491 (Ct. App. 2013)

Vargo does not dispute that Regulation 37-025(B) makes consideration of “seriousness, ...remoteness in time and any mitigating circumstances” permissive rather than mandatory. S.C. Code Ann. Regs. 37-025 But candor to the tribunals that have addressed this regulation is instructive. The Administrative Law Court has twice affirmed permanent-denial sanctions while expressing acute discomfort with them. In *Ragsdale*, the court was “deeply troubled” that the Council permanently denied certification for “a single incident of misrepresentation which the [officer] corrected within a very short time.” (Joseph Ragsdale v. SCCJA, No. 19-ALJ-30-0344-AP, 2020 WL 804241) In *Garcia*, the court was “concerned ...about the harsh sanction imposed” on a decorated officer for “a single, remote omission.” Katrina Garcia v. SCCJA, No. 20-ALJ-30-0134-AP, 2020 WL 6471374). The distinguishing feature those courts identified was the *presence or absence of a record of good service*: the sanctions were affirmed in *Ragsdale* precisely because “the record does not possess evidence of the [officer’s] positive accomplishments.” Joseph Ragsdale v. SCCJA, No. 19-ALJ-30-0344-AP, 2020 WL 804241. Here, the opposite is true — the record overflows with evidence of exemplary service. This is the

case those courts flagged but did not have before them: overwhelming, undisputed mitigation, ignored in favor of the maximum penalty.

The Council's silence on mitigation is not a shield; it is the injury. Because the Council made no findings, neither the Administrative Law Court nor this Court can review whether the Council exercised reasoned judgment or simply applied a reflexive, unwritten rule that every dishonesty allegation yields permanent denial — a practice that would itself be an abuse of discretion. *Cf. Lyle McIntyre v. SCCJA*, No. 21-ALJ-30-0155-AP, 2021 WL 4353162 (rejecting a bright-line-rule challenge only because the record there affirmatively showed the Council weighed a lesser sanction and considered mitigation). On this record there is no such showing, and the abuse-of-discretion review to which Vargo is entitled cannot be conducted. The appropriate remedy, at minimum, is a remand requiring the Council to make findings and to reconsider a sanction proportionate to the conduct.

IV. The decade-long delay bars this proceeding under laches, waiver, and estoppel.

Preservation

The Council contends this defense was not preserved. The record shows otherwise. Counsel argued the ten-year delay in closing at the contested-case hearing, and Vargo's Motion in Opposition to the Hearing Officer's Recommendation expressly pointed to the absent interviewer, the missing 2013 records, and the passage of time. (RA 31). The Hearing Officer engaged the point, acknowledging it was "understandable that someone would not remember all of the details of multiple interviews from ten years ago." (RA 31) Because the delay and its

prejudice were raised below and addressed by the fact-finder, the defense is preserved for review. *Dorman v. Dep't of Health & Env't Control*, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002)

Laches applies in administrative proceedings

Laches is not confined to civil actions; South Carolina courts apply it to bar stale administrative claims. In *Richey*, the Court of Appeals held a workers' compensation claim barred by laches where an eleven-year delay caused the loss of agency files and the unavailability of witnesses — "material prejudice" flowing directly from the delay. *Richey v. Dickinson*, 359 S.C. 609, 598 S.E.2d 307 (Ct. App. 2004) The elements are delay, unreasonable delay, and resulting material prejudice. *Emery v. Smith*, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004); *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999)

Each element is satisfied. The Department waited more than a decade to act. That delay caused precisely the *Richey* prejudice: the polygraph audio was destroyed, no interview transcript exists, the interviewer Rikard had left and could not be located, and the polygraph administrator was never called. Vargo cannot cross-examine witnesses who are gone or rebut a record the Department failed to preserve, and he is left to reconstruct a single conversation from more than ten years ago. "Delay alone" is not enough — but delay that "result[s] in material prejudice" is the core of the doctrine, *Bailey v. Lyman Printing & Finishing Co.*, 245 S.C. 13, 138 S.E.2d 410 (1964), and this delay gutted Vargo's ability to defend himself.

Unclean hands does not save the Council's delay

The Council argues Vargo's own concealment triggered the delay and bars him under unclean hands. The argument fails for two reasons. First, the premise is contested and unproven:

as shown in Part I, the record does not establish that Vargo willfully concealed anything, and unclean hands requires “willful” wrongdoing, not “mere ...negligence, ignorance, or inappropriateness.” *Williams v. Jeffcoat*, 444 S.C. 224, 906 S.E.2d 588 (2024) Where the evidence on unclean hands “is susceptible of competing inferences,” the defense cannot be resolved against the party as a matter of law. *Williams v. Jeffcoat*, 444 S.C. 224, 906 S.E.2d 588 (2024)

Second, even accepting the Council’s framing, the material prejudice here flows not from Vargo’s conduct but from *the Department’s own failure* to preserve the polygraph record, retain its interviewer, or document the interview — an independent default the delay doctrine squarely addresses. A party cannot manufacture the prejudice through its own evidentiary neglect and then invoke the opposing party’s conduct to excuse it. *Cf. Emery v. Smith*, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004) (where the delay in asserting a right was caused by a party’s own failure to act, the unreasonableness element is not met and “[l]aches cannot possibly act as a bar”).

CONCLUSION:

The Council permanently ended a decorated officer's law enforcement career on a willfulness finding that the fact-finders themselves called "plausible" only in the innocent direction, that rests on no witness testimony and a destroyed record, and that the reviewing court admitted it would likely not have made. That is not substantial evidence. The sanction, imposed for pre-certification conduct, in the teeth of a remand for reasoned findings, and without a word addressing overwhelming mitigation, is arbitrary and an abuse of discretion. And the decade-long delay, having destroyed the very evidence needed to defend, bars the proceeding.

Appellant Joshua A. Vargo respectfully requests that this Court **reverse** the finding of misconduct for lack of substantial evidence; in the alternative, **reverse** as an error of law or an abuse of discretion; or, at minimum, **remand** with instructions that the Council make findings on mitigation and reconsider the sanction.

Respectfully submitted,



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